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FILED/ACCEPTED

JUL 18 2007

Federal Communications Commission
Office of the Secretary

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July 18, 2007

VIA HAND DELIVERY

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, D.C. 20554

Re: *Primosphere Limited Partnership Application for Authority
to Construct, Launch and Operate Satellites in the Satellite
Digital Audio Radio Service, File Nos. 29/30-DSS-LA-93,
16/17-DSS-P-93*

Dear Ms. Dortch:

Attached for filing in the above-referenced docket please find an original and four copies of the Opposition of Sirius Satellite Radio Inc. ("Sirius") to the Motion to Consolidate this docket with MB Docket No. 07-57, filed by Primosphere on July 3, 2007. A copy of this Opposition is also being filed in MB Docket No. 07-57 via ECFS.

Sirius is filing this Opposition in the above-referenced docket for the sake of administrative convenience, and by doing so does not concede that the above-referenced docket remains active.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Joshua S. Turner

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
JUL 18 2007
Federal Communications Commission
Office of the Secretary

In the Matter of

Sirius Satellite Radio Inc.,

MB Docket No. 07-57

and

XM Satellite Radio Holdings, Inc.

Consolidated Application for Authority
to Transfer Control of XM Radio Inc. and
Sirius Satellite Radio Inc.

Primosphere Limited Partnership

File Nos. 29/30-DSS-LA-93
16/17-DSS-P-93

Application for Authority to Construct,
Launch and Operate Satellites in the
Satellite Digital Audio Radio Service

To: The Commission

OPPOSITION TO PRIMOSPHERE'S MOTION TO CONSOLIDATE

Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby submits this
Opposition to the "Motion to Consolidate" filed by Primosphere Limited Partnership on
July 3, 2007 ("Motion"). Because there is nothing to consolidate, this Motion should be
denied.

The Motion is Primosphere's latest gambit in an attempt to breathe new life into its long-dead application for satellite radio service and profit from the proposed XM/Sirius merger. Primosphere's application for an SDARS license was mooted by the grant of licenses to the high SDARS auction bidders, Sirius and XM. The D.C. Circuit subsequently rejected all of Primosphere's challenges to the Commission's handling of the satellite radio auction process. In turn, Primosphere voluntarily withdrew its Application for Review of the Bureau's denial of its own application for a license in 2004. Other than submitting a request for a refund of its fees, which was denied, Primosphere took no further action at the Commission until February 2007, when it filed a document purporting to "withdraw" its voluntary withdrawal of the Application for Review, and followed that up with a "Supplement" to its six-year-old mooted and withdrawn Application for Review. Sirius filed a Motion to Strike these pleadings.¹

As Sirius explained in detail in its Motion to Strike and in its Reply in Support of its Motion to Strike,² copies of which are attached hereto, there is no basis for the Commission to consider Primosphere's pleadings. Primosphere withdrew its Application for Review voluntarily, and that withdrawal was effective without the need for Commission action. There is no way for Primosphere to un-ring this bell three years later. Moreover, Primosphere withdrew its Application for Review because the grant of licenses to Sirius and XM and the affirmance of those grants by the D. C. Circuit

¹ Sirius Satellite Radio Inc., Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (Apr. 23, 2007) (Attachment A).

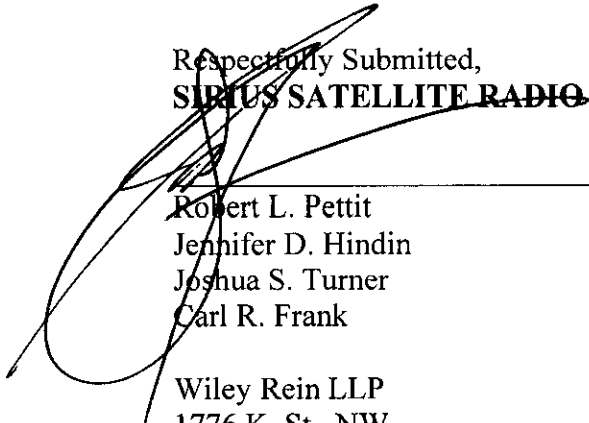
² Sirius Satellite Radio Inc., Reply in Support of Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (May 18, 2007) (Attachment B).

rendered its application for a license moot, providing yet another basis for concluding that Primosphere's license proceeding terminated many years ago.

Even assuming that Primosphere could somehow re-submit its Application for Review *nunc pro tunc*, the 2007 "Supplement" is vastly out-of-time, as supplements to applications for review must be filed within 30 days of the decision of which review is sought—and the Bureau's decision was rendered in 2001. Moreover, contrary to the Commission's Rules, the Supplement raises issues of fact and law that were not, and could not have been, presented to the International Bureau. Because it relies entirely on facts and circumstances that postdate the Bureau's rejection of Primosphere's license, the "Supplement" also cannot point to any reversible error.

As Sirius has demonstrated, Primosphere's license proceeding has long concluded, and cannot be revived. Because there is no other proceeding to consolidate, Primosphere's Motion to Consolidate should be denied.

Respectfully Submitted,
SIRIUS SATELLITE RADIO INC.



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July 18, 2007

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that copies of the foregoing Opposition to the Motion to Consolidate were served upon the following today, July 18, 2007.



Joshua S. Turner

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
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ATTACHMENT A

J. Turner
Stamp and Return

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

APR 23 2007

Federal Communications Commission
Office of the Secretary

In the Matter of

Primosphere Limited Partnership

Application for Authority to Construct,
Launch and Operate Satellites in the
Satellite Digital Audio Radio Service

File Nos. 29/30-DSS-LA-93
16/17-DSS-P-93

To: The Commission

MOTION TO STRIKE

SIRIUS SATELLITE RADIO INC.

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April 23, 2007

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INTRODUCTION AND SUMMARY

Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby moves to strike¹ the following two filings by Primosphere Limited Partnership ("Primosphere"): (1) the February 23, 2007 letter seeking to withdraw its April 16, 2004 "Motion to Withdraw Application for Review", and (2) the March 19, 2007 "Supplement to Application for Review." These filings try to turn back the clock and resuscitate Primosphere's long-extinct satellite radio application.

Primosphere's current desire to prosecute its withdrawn 2001 Application for Review² is precluded by its prior actions, settled judicial precedent, and the Commission's rules. Primosphere's original 2004 withdrawal of its 2001 Application for Review was effective immediately upon filing, and did not require the Commission's imprimatur. The plain text of the withdrawal makes clear that it was "voluntar[y]" and "unilateral[]" and that Primosphere was not asking for any agency action. This is consistent with D.C. Circuit precedent, which holds that withdrawals of petitions for agency review are effective for Article III standing purposes upon filing. There is also no Commission rule that requires agency action; Primosphere's reliance on Section 1.935 is misplaced, as this anti-greenmail provision does not apply to satellite services, and in any event only covers requests to withdraw petitions to deny or settlement agreements resolving mutual exclusivity. Primosphere's withdrawal of its own application, in

¹ By filing this Motion to Strike, Sirius does not concede that this docket remains active or that any pleadings herein still are pending.

² Presumably, Primosphere is trying to claim special standing in the unrelated docket reviewing Sirius and XM's application to merge. See *XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. Seek Approval to Transfer Control of Licensee Entities Holding FCC Licenses and Other Authorizations*, Public Notice, MB Docket 07-57 (Mar. 29, 2007).

contrast, was compelled by the D.C. Circuit's rejection of its challenges to the SDARS auction in parallel proceedings.

Primosphere's attempt to have the Commission reinstate its application is also barred by the fact that the Sirius and XM licenses are final. Primosphere's application for an SDARS license could only be "pending" as long as its challenges to the Sirius and XM licenses were unresolved. Once the D.C. Circuit fully and completely rejected those challenges, the Sirius and XM licenses became final, rendering Primosphere's lower-bid application moot. These decisions are the law of the case, and are not subject to collateral attack now.

Even if Primosphere could resurrect its 2001 application for review, Primosphere's attempt to overhaul that application with a "Supplement" must be rejected as procedurally defective. The Commission's Rules require any supplements to applications for Commission review to be filed within 30 days of the original decision. Primosphere's Supplement is five years late. Moreover, the Rules also bar any application or supplement that relies on facts or law not first presented to the Bureau. Here, Primosphere's Supplement consists *entirely* of factual allegations arising from the pending Sirius/XM merger, which were not (and could not have been) considered by the Bureau in its original decision nearly ten years ago. Because the Supplement rests completely on recent facts and events, Primosphere cannot comply with the Commission's further requirement that an application for review identify with particularity the source of the alleged Bureau error.

For these reasons, Primosphere's pleadings should be stricken.

I. BACKGROUND

Fifteen years ago, Primosphere tried, but failed, to become a satellite radio licensee. In the May 1997 satellite radio spectrum auction, Primosphere was vastly outbid by Sirius and XM.³ Primosphere then petitioned the International Bureau to deny each of Sirius' and XM's satellite radio license applications.⁴ In October 1997, the International Bureau rejected Primosphere's petitions – finding both XM and Sirius legally, technically and financially qualified to be satellite radio licensees – and granted satellite radio licenses to Sirius and XM.⁵ At the same time, in accordance with FCC rules, the International Bureau dismissed Primosphere's application.⁶

Primosphere then filed applications for review by the full Commission of the license grants to Sirius and XM and also petitioned the International Bureau to reconsider

³ See *FCC Announces Auction Winners for Digital Audio Radio Service*, Public Notice, 12 FCC Rcd 18,727 (1997). The winning bids were \$83,346,000 for Sirius (then called Satellite CD Radio, Inc.) and \$89,888,888 for XM (then called American Mobile Radio Corporation). Primosphere's last bid was approximately \$23 million lower than the eventual winning bid. See ftp://ftp.fcc.gov/pub/Auctions/DARS/Auction_15/Results/ (Primosphere's (Bidder Identification No. 250) final bid in Auction Round 17 (Text file No. 15_017s.txt - Primosphere losing bid of \$56,753,194) and final bid in Auction Round 18 (Text file No. 15_018s.txt - Primosphere final and losing bid of \$67,501,339)).

⁴ *Application of Am. Mobile Radio Corp. for Authorization to Construct, Launch & Operate Two Satellites in the Satellite Digital Audio Radio Serv.*, Pet. to Deny Application, File No. 72-SAT-AMEND-97 (filed Jun. 23, 1997); *Application of Satellite CD Radio, Inc. for Authorization to Construct, Launch & Operate Two Satellites in the Satellite Digital Audio Radio Serv.*, Pet. to Deny Application, File No. 71-SAT-AMEND-97 (filed Jun. 23, 1997).

⁵ See *Am. Mobile Radio Corp. Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Order & Authorization, 13 FCC Rcd 8829 (1997); *Satellite CD Radio, Inc., Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Order & Authorization, 13 FCC Rcd 7971 (1997) ("Sirius Order").

⁶ See *Digital Satellite Broad. Corp.; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*; *Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Order, 13 FCC Rcd 8976 (1997) ("Primosphere Dismissal Order").

the dismissal of its own application.⁷ At the Bureau, Primosphere “argue[d] that the dismissal of its application was premature in light of its pending applications for review of the grant of the winning applicants’ applications” and “assert[ed] that if either of its applications for review is successful, Primosphere’s application would be eligible for grant.”⁸ In November 2001, the Commission denied Primosphere’s applications for review and affirmed the licenses granted to Sirius and XM. That same month, the International Bureau denied Primosphere’s request to reconsider the order dismissing its satellite radio application.⁹

Primosphere next petitioned the United States Court of Appeals for review of the Sirius and XM licenses. At that same time, Primosphere applied for full Commission review of the Bureau’s dismissal of its satellite radio application (“2001 Application for Review”). As Primosphere explained, the 2001 Application for Review sought “to preserve its standing as a [satellite radio] applicant while the Court of Appeals considers Primosphere’s petitions for review [of the Sirius and XM application grants]”.¹⁰

On February 21, 2003, the D.C. Circuit rejected each of Primosphere’s challenges and summarily affirmed the XM and Sirius licensing orders.¹¹ Primosphere did not

⁷ See *Primosphere Ltd. P’ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Pet. for Recons., File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (filed Nov. 26, 1997).

⁸ See *Primosphere Ltd. P’ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Order, 16 FCC Rcd 21,175, 21,176 (¶ 4) (2001).

⁹ *Id.* at 21,176 (¶ 6).

¹⁰ See *Primosphere Ltd. P’ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Application for Review, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, at 3 (filed Dec. 27, 2001) (“2001 Application for Review”).

¹¹ *Primosphere Ltd. P’ship v. FCC*, Nos. 01-1526, 01-1527, 2003 U.S. App. LEXIS 18577 (D.C. Cir. 2003).

pursue *en banc* review or *certiorari*, so the Sirius and XM licenses became administratively final when those deadlines lapsed in May 2003. Consistent with the Court's decision and both licenses' finality, on April 16, 2004 Primosphere "unilaterally and voluntarily" withdrew its 2001 Application for Review of the order dismissing its license application ("2004 Voluntary Withdrawal").¹²

Now, three years later, Primosphere wants to withdraw the withdrawal¹³ of its 2001 Application for Review, and "supplement" that now-defunct pleading with novel, never-before-asserted claims based on recent events.¹⁴ Neither should be permitted.

II. THE COMMISSION SHOULD STRIKE PRIMOSPHERE'S LETTER PURPORTING TO WITHDRAW THE 2004 VOLUNTARY WITHDRAWAL OF ITS APPLICATION FOR REVIEW.

Primosphere could have been a satellite radio licensee, but it fell short in a fair process when it dropped out of the auction on April 2, 1997, and thereafter, the Bureau appropriately denied Primosphere's application. After the D.C. Circuit rejected its challenges to the qualifications of the winning bidders, Primosphere withdrew its then-pending 2001 Application for Review, at which point the dismissal of Primosphere's application became final. Though Primosphere acknowledges this filing, it now insists that its satellite radio application remains pending because it "request[ed] that its

¹² See *Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Mot. to Withdraw Application for Review, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, at 1 (filed Apr. 16, 2004) ("2004 Voluntary Withdrawal").

¹³ See Letter from Howard M. Liberman, Drinker Biddle & Reath LLP, to Marlene Dortch, Secretary, FCC (Feb. 23, 2007) ("Letter").

¹⁴ See *Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Supplement to Application for Review, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (filed Mar. 19, 2007) ("Supplement").

Application for Review be dismissed” but the Commission never acted on that request.¹⁵ This argument mischaracterizes Primosphere’s own pleadings, tortures logic, and ignores settled law.

A. Primosphere’s 2004 Voluntary Withdrawal Was Effective Immediately Upon Filing, Without Need for Agency Action.

Primosphere’s February 23, 2007 letter should be stricken because its 2004 Voluntary Withdrawal was effective immediately upon filing. That pleading neither sought FCC action nor asked the agency to dismiss its 2001 Application for Review.¹⁶ Rather, Primosphere’s 2004 Voluntary Withdrawal acknowledged the new legal landscape resulting from the D.C. Circuit decision and announced its sole and independent decision:

[T]he Court of Appeals denied Primosphere’s appeals and affirmed the Commission[’]s decisions. *Accordingly*, Primosphere now voluntarily and unilaterally withdraws its Application for Review and associated Reply.¹⁷

As its own filing demonstrates, Primosphere’s application was Primosphere’s to prosecute or to withdraw, whether or not the agency responded.

This point is confirmed by Primosphere’s own conduct. For years, Primosphere did nothing to advance its application. To the contrary, on July 9, 2004, Primosphere asked the Commission for a refund of its application fees, arguing that its loss at auction and in Court rendered the FCC’s rejection of its application final.¹⁸ The Commission’s

¹⁵ *Id.* at 2.

¹⁶ Though captioned as a “Motion,” the 2004 Voluntary Withdrawal did not ask the Commission to do anything.

¹⁷ 2004 Voluntary Withdrawal at 1 (emphasis added).

¹⁸ See *Primosphere Ltd. P’ship; Application for Refund of Satellite Launch & Operation Auth. Application Fees*, Application for Review, Fee Control No. 9301158160318001 (filed June 22, 2005). While Primosphere claimed in this pleading that its application for review was still pending absent action by the

Office of Managing Director (“OMD”) rejected Primosphere’s request on unrelated grounds, but concurred that Primosphere’s withdrawal was effective without any need for agency action: “Primosphere filed an application for review . . . , *which Primosphere withdrew in April 2004.*”¹⁹

Case precedent supports this common-sense interpretation that Primosphere’s 2004 Voluntary Withdrawal was effective immediately. According to the D.C. Circuit, once a party withdraws a request for administrative review, the underlying decision is final for the purposes of appeal just as if the matter had been adjudicated by the agency.²⁰ Thus, while “[a] party’s pending request for agency reconsideration renders the underlying action non-final . . . with respect to that party,”²¹ a withdrawal of pending requests for agency reconsideration “cure[s] the jurisdictional defect” by creating finality.²² Such finality does not depend on the agency first issuing an order blessing the withdrawal.²³ Indeed, because courts consider a voluntary withdrawal effective, and the

Bureau, *id.* at 6, Primosphere also acknowledged that “[r]efunds are . . . premature until the dismissal or denial of the unsuccessful bidder’s application is final and it can no longer challenge the winning bidder’s basic qualifications,” which occurs “only once the grant of the winning bidder’s application *and the denial of the losing bidder’s application is final*,” *id.* (quoting *Implementation of Section 309(j) of the Commc’ns Act*, First Report & Order, 13 FCC Rcd 15,920, 15,957 (¶ 102) [*sic*—15,958 (¶ 104)] (1998) (emphasis added) (omission in Application for Review)). By submitting a request for refund, Primosphere clearly signaled that, in its view, dismissal of its application was final once it filed its withdrawal.

¹⁹ See *Primosphere Ltd. P’ship; Application for Refund of Satellite Launch & Operation Auth. Application Fees*, Letter from Mark A. Reger, Chief Financial Officer, OMD, to Howard M. Liberman, Drinker Biddle & Reath LLP, Fee Control No. 9301158160318001, at 2 n.7 (May 23, 2005) (emphasis added).

²⁰ *L.A. SMSA Ltd. P’ship v. FCC*, 70 F.3d 1358, 1359-60 (D.C. Cir. 1995).

²¹ *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 919 (D.C. Cir. 1998) (internal quotation and citation omitted).

²² *Id.* at 920.

²³ *L.A. SMSA*, 70 F.3d at 1359 (discussing a case where “[t]he same day this court rendered its decision, [petitioner] heeded the advice, *withdrew its agency petition*, and *immediately filed* a second petition for judicial review, . . . over which we assumed jurisdiction and made a decision on the merits” (emphasis

proceeding final, upon filing for purposes of appellate jurisdiction, adopting the contrary view here would be inconsistent with appellate precedent and would insert needless uncertainty into the basic notion of administrative finality.

Moreover, no rule compels the Commission to take notice of, or otherwise act upon, withdrawals. Primosphere erroneously cites Section 1.935(c)(2) of the rules to claim that, absent Commission action on the 2004 Voluntary Withdrawal, its 2001 Application For Review remains pending.²⁴ That section, which requires that the Commission approve *certain* withdrawal requests, is inapplicable here. *First*, Section 1.935 is found in Subpart F of Part 1 of the Commission's Rules, and the provisions of this subpart apply only to "Wireless Radio Services as described in this part and in parts 13, 20, 22, 24, 26, 27, 74, 80, 87, 90, 95, 97 and 101 of this chapter."²⁵ Satellite radio is licensed pursuant to Part 25 of the Commission's Rules—and thus is not covered by Section 1.935. *Second*, Section 1.935 is limited to instances where parties "have filed applications that are mutually exclusive with one or more other applications, *and then enter into an agreement to resolve the mutual exclusivity*."²⁶ Here, by contrast, there is not and never has been an agreement with Primosphere to resolve exclusivity²⁷—mutual exclusivity was mooted once Primosphere dropped out of the auction and vanished when

added)); *see also Columbia Falls*, 139 F.3d at 919 (noting that petitioners informed the agency "that they were 'hereby withdraw[ing] any and all such' requests then pending," and then "*immediately filed* a new petition for judicial review and a motion to consolidate it with the earlier petitions, which [the court] granted" (internal citation omitted) (emphasis added)).

²⁴ See Letter (citing 47 C.F.R. § 1.935(c)(2) [*sic*—probably 1.935(d)(2)]).

²⁵ 47 C.F.R. § 1.901.

²⁶ *Id.* § 1.935 (emphasis added).

²⁷ The rule also applies where one applicant seeks to withdraw petitions or objections to a mutually exclusive applicant, which is not implicated here: Primosphere's withdrawal addressed only its previously-dismissed application, not its Petitions to Deny whose arguments were considered, and rejected, in court.

the Court of Appeals upheld the Sirius and XM licenses. *Third*, under the doctrine of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others), the fact that the FCC's rules explicitly require Commission approval of withdrawal requests in certain circumstances confirms that no such approval is required elsewhere, including here.²⁸

B. XM and Sirius' Satellite Radio Licenses are Final.

The Commission should also strike Primosphere's attempt to revive its 2001 Application for Review because that pleading was part of the 1997 satellite radio licensing process, completed long ago. Primosphere's application was "pending" only as long as the grant of the mutually exclusive licenses to XM and Sirius were still being contested. Once the D.C. Circuit rejected Primosphere's arguments and the grant of Sirius' and XM's licenses became final, there was no satellite radio license to seek, and Primosphere's application became moot. Indeed, Primosphere conceded that the status of its license application was inextricably tied to the ultimate disposition of the Sirius and XM grants.²⁹ Its 2001 Application for Review states that "[i]f the court reverses and/or remands [the Sirius or XM grants], *then* Primosphere's SDARS application will remain pending . . . and may be considered *upon the ultimate denial*" of either the Sirius or XM grant.³⁰

²⁸ See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (where rules of civil procedure specifically impose a requirement in certain types of actions, there is no such requirement in other actions).

²⁹ See 2001 Application for Review at 3.

³⁰ *Id.* (emphasis added).

But none of these things happened. The court did not reverse or remand either license application, and neither XM's nor Sirius' license was denied.³¹ Rather, as the Bureau recognized, once XM and Sirius were licensed, Primosphere's formerly mutually exclusive satellite radio application became moot³² whether or not Primosphere recognized that fact. Thereafter, when the D.C. Circuit upheld the licenses, and Primosphere chose not to seek *en banc* review in the Circuit or *certiorari* in the Supreme Court, the opportunity for further challenge ended, and that mootness became final. A mooted application for a license that does not exist simply cannot be viewed as "pending" under any reasonable interpretation of that term.³³

This case presents a stark lesson regarding the need for finality in government processes. Primosphere's claims have been fully and finally adjudicated. In the meantime, and in reliance on administrative and judicial finality, Sirius and XM have both built successful commercial operations and today serve approximately 15 million subscribers. Sirius alone has invested billions in constructing its satellite system and providing service to its customers. Primosphere's attempt to re-open a long-settled

³¹ Primosphere's Supplement proffers another purported rationale for reviving its expired application, quoting the FCC's contingency plan for a re-auction among the previously existing applicants "[i]f the winning bidder fails to submit the balance of the winning bid or the license is otherwise denied." Supplement at 2 (quoting *Establishment of Rules & Policies for the Digital Audio Radio Satellite Serv.*, Report & Order, 12 FCC Rcd 5754, 5820 (¶ 165) (1997) (emphasis omitted)). Again, however, neither event occurred: the winning bidders submitted the balance of their bids, the licenses were issued, and both Sirius and XM began providing successful commercial service. Absent such a condition precedent, Primosphere's alternative argument is equally invalid.

³² *Primosphere Dismissal Order*, 13 FCC Rcd at 8977 (¶ 3).

³³ Primosphere also claims that because it is allegedly still "an existing applicant for authorization" to provide satellite radio, Supplement at 2, the Commission should "authorize a portion of the SDARS spectrum to Primosphere if the Commission approves the XM/Sirius merger," *id.* at 3. Because Primosphere is not "an existing applicant," this claim deserves little attention. However, Primosphere has provided no explanation for why the loser in a competitive auction should be awarded access to "a portion of the SDARS spectrum" after the auction resulted in licensing the highest bidders.

proceeding is a cynical effort to cash in on the market that Primosphere voluntarily abandoned after losing at auction, losing on administrative review, and losing in court. If successful, such a gambit would undermine the certainty of every Title III license to the benefit of no one but Primosphere.

III. THE SUPPLEMENT IS DEFECTIVE UNDER THE COMMISSION'S RULES AND MUST BE STRICKEN.

Having attempted to withdrawal its withdrawal, Primosphere filed to fluff-up its abandoned Application for Review via a so-called "supplement." This pleading is both late-filed and raises issues never presented to the Bureau. Further, Primosphere's pleading actually is a "substitute"—it would replace all previous arguments (which have already been rejected by the D.C. Circuit in parallel proceedings) with allegations based on actions and events that long post-date the licensing decisions.

Neither due process nor the Rules countenance basing Commission "review" of a Bureau decision on circumstances that arose long after the fact. Rather, Section 1.115 requires those seeking review of Bureau decision to "specify with particularity" the asserted "conflict with statute, regulation, case precedent, or established Commission policy" or other specific basis for the Commission to conclude that the Bureau acted in error.³⁴ Because Primosphere's supplement does not and cannot do so, it should be stricken.

A. The Supplement is Years Beyond the 30 Day Limit Set Forth in Section 1.115(d).

Section 1.115(d) of the Commission's Rules provides that any supplement to an application for review "shall be filed within 30 days of public notice" of the delegated

³⁴ 47 C.F.R. § 1.115(b)(2).

authority action for which review is sought.³⁵ Where a supplement is filed more than 30 days after the date of public notice, the filing is “procedurally deficient and warrant[s] dismissal on its face.”³⁶ Here, the original public notice of the Bureau’s decision dismissing Primosphere’s application was November 30, 2001.³⁷ The current Supplement, filed on March 19, 2007, is more than five years late. Primosphere neither seeks to waive Section 1.115, nor presents a cognizable excuse to justify expanding the time for filing more than five years.³⁸ The Commission should dismiss this pleading “on its face” for its lack of timeliness alone.

B. The Supplement Raises New Issues of Fact and Law that were Not Presented to the International Bureau, In Violation of Section 1.115(c).

The Commission’s Rules also mandate that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”³⁹ The FCC has routinely dismissed applications that fail to adhere to this requirement.⁴⁰ The D.C. Circuit has held that dismissal of an application for review that raises new issues of fact and law is

an . . . open-and-shut case: the Commission’s rules do not permit the Commission to grant an application for review

³⁵ *Id.* § 1.115(d).

³⁶ *BDPCS*, Mem. Op. & Order, 15 FCC Rcd 17,590, 17,597 (¶ 10) (2000).

³⁷ *See* 2001 Application for Review at 1.

³⁸ This is not the first time that Primosphere has attempted to raise new issues by slipping in an untimely “supplement” without seeking the requisite approval to do so. *See Sirius Order*, 13 FCC Rcd at 7985 (¶ 30) (rejecting as untimely Primosphere’s attempt to supplement its opposition to Sirius’s application).

³⁹ 47 C.F.R. § 1.115(c).

⁴⁰ *See, e.g., Applications of Warren C. Havens*, Mem. Op. & Order, 17 FCC Rcd 17,588, 17,591 (¶ 9) (2002); *Charles T. Crawford*, Order, 17 FCC Rcd 2014, 2017-18 (¶ 10) (2002); *BDPCS*, 15 FCC Rcd at 17,597 (¶ 10); *Application of Kenny D. Hopkins*, Mem. Op. & Order, 5 FCC Rcd 604, 605 (¶ 13) (1990).

*"if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." The Commission abuses its discretion when it arbitrarily violates its own rules, not when it follows them.*⁴¹

The arguments in the Supplement are built entirely around recent events associated with the XM/Sirius merger.⁴² Not only were such claims never presented to the Bureau, they could not have been—because they rely on circumstances occurring long after licensing and long after the Sirius and XM licenses became final.

C. Primosphere Does Not, and Cannot, Point to Any Reviewable Error.

The FCC will review and reverse Bureau decisions where:

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
- (iii) The action involves application of a precedent or policy which should be overturned or revised.
- (iv) [The decision relies on an] erroneous finding as to an important or material question of fact.
- (v) [The decision contains] [p]rejudicial procedural error.⁴³

Primosphere's Supplement makes no attempt to comply with the requirements of Rule 1.115. As noted above, Primosphere's original grounds for full Commission review were

⁴¹ *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting 47 C.F.R. § 1.115(c)).

⁴² See Supplement at 2 (referring to the Sirius/XM merger announcement on February 19, 2007, an event that occurred nine and a half years after the Bureau decision that Primosphere ostensibly wishes the Commission to review); *Id.* at 3 (asking the Commission to award "a portion of the SDARS spectrum *if the Commission approves the proposed XM/Sirius merger*," an event that has not yet occurred (emphasis added)); *Id.* at 3-4 (seeking Commission-mandated access to XM's and Sirius's existing satellites if the Commission approves the merger).

⁴³ 47 C.F.R. § 1.115(b)(2).

entirely derivative of its objections to the XM and Sirius applications. Once those arguments were rejected by the D.C. Circuit, that determination became controlling law of the case here and cannot be collaterally attacked, *four years later*, at the FCC.⁴⁴ As such, the Bureau's rejection of Primosphere's license application became final and Primosphere's Application for Review became moot even if the latter had not been withdrawn.⁴⁵

Rather than arguing that the Bureau acted in error, Primosphere's Supplement presents totally novel claims, based on entirely different facts and law, from that contained in the original Application. It goes without saying that Primosphere cannot claim that the Bureau committed reversible error 10 years ago by failing to consider events that had not then occurred and in some cases *still have not occurred*.

Primosphere is thus not actually asking for review of a Bureau decision. Instead, it wants a do-over—of the satellite radio auction, of the licensing process, of investing in infrastructure and seeking subscribers. But low-bidder laments are not grounds for

⁴⁴ "Law-of-the-case doctrine" refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Law of the case applies where the "appeals court has affirmatively decided the issue, be it explicitly or by necessary implication." *Id.* Here, the D.C. Circuit's rejection of Primosphere's challenges to XM and Sirius's licenses necessarily decided by implication that Primosphere's lower-bid application could not be granted. Primosphere is also be barred from raising these arguments in any subsequent litigation by the doctrine of *res judicata*. *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) ("Under the doctrine of *res judicata*, or claim preclusion, a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.")

⁴⁵ Put differently, contentions in the Supplement that previously were raised in Primosphere's Application for Review have been fully adjudicated by the D.C. Circuit and can not be relitigated here. Arguments from the Supplement founded on new questions of fact or issues of law are impermissible when seeking review of a Bureau order under Section 1.115(c) of the rules. Accordingly, even were Primosphere's 2007 attempted withdrawal of its 2004 Voluntary Withdrawal effective, the Application for Review and belated Supplement are both improper and untimely—and long final—and thus should be dismissed as moot.

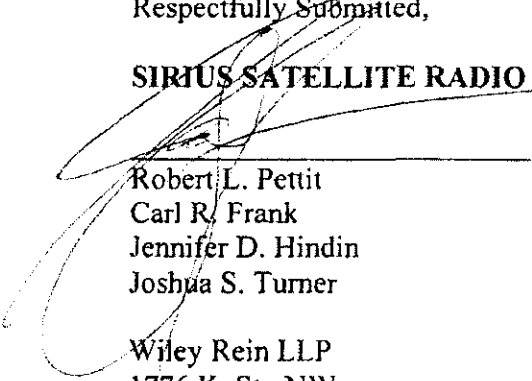
review, and regulatory replays are the antithesis of administrative justice. Because this falls well outside the legitimate purposes of an application for review, Primosphere's attempted amendment of its Application is fatally defective and should be stricken.

IV. CONCLUSION

For the foregoing reasons, Primosphere's two filings in the above-referenced docket should be stricken. To the extent that the Commission gives effect to Primosphere's withdrawal of its 2004 Voluntary Withdrawal, the Commission should still conclude that Primosphere cannot supplement and alter its Application for Review more than five years after it was filed, and should enter an order dismissing the Application for Review and Supplement.

Respectfully Submitted,

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April 23, 2007

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that copies of the foregoing Motion to Strike were served upon the following today, April 23, 2007.



Joshua S. Turner

Marlene Dortch
Secretary
Federal Communications Commission
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Via Hand Delivery

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ATTACHMENT B

Stamp and Return

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

MAY 18 2007

Federal Communications Commission
Office of the Secretary

In the Matter of

File Nos. 29/30-DSS-LA-93
16/17-DSS-P-93

Primosphere Limited Partnership

Application for Authority to Construct,
Launch and Operate Satellites in the
Satellite Digital Audio Radio Service

To: The Commission

REPLY IN SUPPORT OF MOTION TO STRIKE

Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby submits this Reply in Support of its Motion to Strike Primosphere's February 23, 2007 letter and March 19, 2007 Supplement to Primosphere's Application for Review in the above-referenced docket. For the reasons stated in Sirius' Motion to Strike¹ and stated below, Primosphere's filings should be stricken from the record immediately.

I. PRIMOSPHERE'S APPLICATION WAS VOLUNTARILY WITHDRAWN AND THAT WITHDRAWAL IS FINAL.

The factual background of this case was discussed in Sirius' Motion and will not be repeated here. Suffice it to say that Primosphere, having sat on the sidelines for years, now seeks to withdraw its withdrawal of its Application for Review. However, Primosphere's voluntary withdrawal of its Application for Review was effective upon

¹ Sirius Satellite Radio, Inc., Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (Apr. 23, 2007).

filing, without any need for Federal Communications Commission ("Commission" or "FCC") action, and the Application for Review cannot be resurrected now.

Primosphere's Opposition erroneously claims that two FCC rules require agency action before a voluntary withdrawal is effective.² Section 25.152(a) states that "[a]ny application may be dismissed without prejudice *as a matter of right* if the applicant requests its dismissal prior to final Commission action."³ In this Rule, "may" refers to the applicant's choice, not any potential action by the FCC. Indeed, the plain terms of the rule state that an applicant has the *right* to voluntarily dismiss its own application, suggesting that the FCC has no discretion in response to a dismissal request and that an order would be superfluous. Section 1.1208 does not address Commission action at all,⁴ and merely sets forth the effect of finality on the ex parte rules. It is silent as to the steps necessary to lead to finality.⁵ Clearly, neither rule requires agency action on a withdrawal.

Primosphere's Opposition does not respond to Sirius' showing that the D.C. Circuit views voluntary withdrawals as final upon filing,⁶ that Rule 1.935 is inapplicable

² Primosphere Ltd. P'Ship Opposition To Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (May 8, 2007), at 2, citing 47 C.F.R. §§ 24.152(a); 1.1208.

³ 47 C.F.R. § 25.152(a) (emphasis added).

⁴ 47 C.F.R. § 1.1208.

⁵ Primosphere's claim that agency action is required to advise the public that a proceeding is final and the ex parte rules no longer apply is not supported by the terms of the rules or precedent. It also strains logic to suggest that the public must be informed that ex parte rules no longer apply to a proceeding that has been withdrawn and is no longer pending; no ex parte discussions are necessary once the application has been withdrawn.

⁶ Motion to Strike at 7-8. The Opposition's claim that the Motion to Strike goes on for "several pages...citing cases that do not involve the Commission," Opposition at 4, is both incorrect and irrelevant. All of the administrative authority in the Motion to Strike comes from the FCC, and the seminal D.C. Circuit case cited in the Motion to Strike also involves an FCC decision. See Motion to Strike at 7 nn. 20,

to this matter,⁷ and that under the doctrine of *expressio unius* the presence of a requirement for Commission action in Rule 1.935 means that no such requirement exists elsewhere.⁸ Primosphere's Opposition is also devoid of any rebuttal to Sirius' showing that Primosphere's application and Application for Review were mooted once the XM and Sirius licenses became final⁹ and that a mooted application for a license that does not exist cannot be "pending" under any circumstances.¹⁰ Finally, the Opposition acknowledges that Primosphere filed a request for a refund of its application fees,¹¹ but does not explain how such a refund request would be appropriate if the license was still pending.¹²

II. THE OPPOSITION DOES NOT ADDRESS THE DEFECTS WITH THE PRIMOSPHERE'S UNTIMELY "SUPPLEMENT."

Sirius' Motion also asks the Commission to strike the attempted "Supplement" because it is fatally defective, both procedurally and substantively.¹³ Primosphere's

22, quoting *L.A. SMSA Ltd. P'ship v. FCC*, 70 F. 3d 1358, 1359-60 (D.C. Cir. 1995). Regardless, general principles of administrative law apply to all administrative agencies, including the FCC.

⁷ *Id.* at 8.

⁸ *Id.* The fact that the Commission included a specific requirement for agency action for certain withdrawals in Rule 1.935 shows that the FCC knows how to impose such a requirement when it wishes to do so and contradicts Primosphere's contention that Section 25.152(a) imposes such a requirement through inference.

⁹ Motion to Strike at 10.

¹⁰ *Id.*

¹¹ Opposition at 2.

¹² As Primosphere recognized at the time, "[r]efunds are . . . premature until the dismissal or denial of the unsuccessful bidder's application is final and it can no longer challenge the winning bidder's basic qualifications," which occurs only once "the denial of the losing bidder's application... is final." *Primosphere Ltd. P'shp; Application for Refund of Satellite Launch & Operation Auth. Application Fees, Application for Review*. Fee Control No. 9301158160318001 (filed June 22, 2005), quoting *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15,920, 15,957 ¶ 102 [*sic*—15,958 (¶ 104)] (1998); see also Motion to Strike at 6 n. 18.

Opposition does not even acknowledge, let alone attempt to *refute, these defects.*

Accordingly, Sirius reiterates that the FCC, in accordance with its own rules, must strike the Supplement because it is untimely,¹⁴ raises new issues of fact and law in contravention of the Commission's Rules,¹⁵ and does not and cannot point to any reversible error on the part of the Bureau (since it relies entirely on circumstances that the Bureau could not have considered).¹⁶

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Motion to Strike, Primosphere's two filings in the above-referenced docket should be stricken.

Respectfully Submitted,
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May 18, 2007

¹³ Motion to Strike at 11-15.

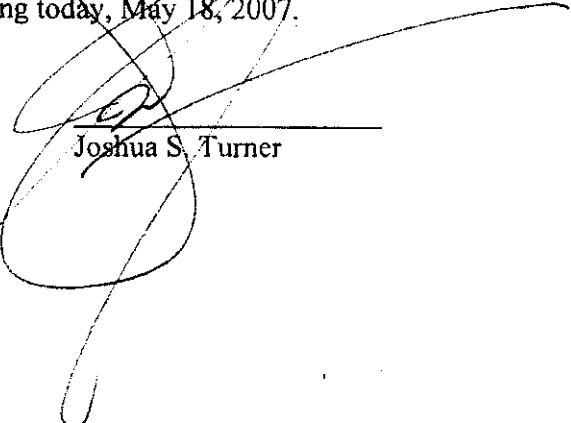
¹⁴ *Id.* at 11-12. Primosphere has still not even *requested* a waiver of Section 1.115(d), which mandates that "any supplement[]" to an application for review must be filed with the Commission within 30 days of the decision for which review is sought, 47 C.F.R. § 1.115(d), let alone attempted to justify such a waiver under the Commission's "good cause" standard, 47 C.F.R. § 1.3.

¹⁵ *Id.* at 12-13.

¹⁶ *Id.* at 13-15.

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that copies of the foregoing Reply in Support of the Motion to Strike were served upon the following today, May 18, 2007.



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